New Surfside Nursing Home *and* Local 144, Hotel, Hospital, Nursing Home and Allied Services Union, Service Employees International Union, AFL–CIO. Case 29–CA–18945

DECISION AND ORDER

November 18, 1996

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND FOX

On May 16, 1996, Administrative Law Judge Steven Davis issued the attached decision. Thereafter, the Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party filed answering briefs, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified and set forth in full below.[2]

ORDER

The National Labor Relations Board orders that the Respondent, New Surfside Nursing Home, Far Rockaway, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with Local 144, Hotel, Hospital, Nursing Home and Allied Services Union, Service Employees International Union, AFL–CIO by denying the Union the information it requested in its letter of January 10, 1995, concerning employee safety and health.

(b) Refusing to bargain in good faith with the Union by denying the Union's requests for access to its facility by the Union's health and safety representative in order to inspect the health and safety conditions that are relevant to the Union's discharge of its bargaining obligation.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish to the Union, in writing, all of the information requested in its letter dated January 10, 1995.

(b) On request, grant access to its facility to a health and safety representative designated by the Union for reasonable periods and at reasonable times, sufficient to allow the Union's representative to fully investigate, inspect, observe, and conduct a complete health and safety inspection.

(c) Within 14 days after service by the Region, post at its Far Rockaway, New York facility, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since March 1, 1995.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In finding that the Respondent unlawfully denied access to its facility to the Union's health and safety representative, the judge applied the standard set forth in *Holyoke Water Power Co.*, 273 NLRB 1369 (1985), enfd. 778 F.2d 49 (1st Cir. 1985). We note that none of the parties in this case has questioned the standard set forth in *Holyoke*. In these circumstances, we will apply *Holyoke* as the controlling precedent in this case. Applying that standard, we agree with the judge that the General Counsel has established that the Respondent violated the Act by denying the Union's safety and health expert access to its facility.

[3] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain in good faith with Local 144, Hotel, Hospital, Nursing Home and Allied Services Union, Service Employees International Union, AFL–CIO by denying the Union the information it requested concerning your health and safety on your job.

WE WILL NOT refuse to bargain in good faith with the Union by denying the Union's requests for access to our facility by the Union's health and safety representative in order to inspect your health and safety conditions that are relevant to the Union's discharge of its bargaining obligation.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL furnish to the Union, in writing, all of the information it requested concerning your health and safety on your job in its letter of January 10, 1995.

WE WILL, on request, grant access to our premises to the Union's designated health and safety representative, for reasonable periods and at reasonable times, sufficient to allow the Union's representative to fully investigate, inspect, observe, and conduct a complete health and safety inspection.

NEW SURFSIDE NURSING HOME

Kevin Kitchen, Esq., for the General Counsel.
Eric Stuart, Esq. (Peckar & Abramson, Esqs.), of River Edge, New Jersey, for the Respondent.
Ellen Dichner, Esq. (Gladstein, Reif & Meginniss, Esq.), of New York, New York, for the Union.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based on a charge filed by Local 144, Hotel, Hospital, Nursing Home and Allied Services Union, Service Employees International Union, AFL–CIO (Union) on March 1, 1995, a complaint was issued against New Surfside Nursing Home (Respondent) on April 27, 1995.

The complaint, as amended at the hearing, alleges essentially that Respondent unlawfully refused the Union's request for information concerning various health and safety issues, and refused to permit the Union access to its premises for the purpose of performing a health and safety inspection.

Respondent's answer denied the material allegations of the complaint, and on February 5, 1996, a hearing was held before me in Brooklyn, New York.

On the evidence presented in this proceeding, and my observation of the demeanor of the witnesses, and after consideration of the briefs filed by all parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a sole proprietorship, having an office and place of business at 22–41 New Haven Avenue, Far Rockaway, New York, has been engaged in the operation of a nursing home and skilled nursing facility, providing nursing, health care, and related services. During the past year, Respondent derived gross revenues in excess of $100,000 from its operations, and has purchased and received at its facility, fuel oil, supplies, goods, and other materials valued in excess of $50,000 directly from points outside New York State.

Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

Respondent also admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

Pursuant to Section 9(a) of the Act, the Union is and has been the exclusive collective-bargaining representative of the employees in certain units set forth in certain collective-bargaining agreements, including service and maintenance employees, licensed practical nurses, and paraprofessional employees.

The Union represents about 60 such employees who care for approximately 175 patients in Respondent's four-story facility.

A. *The Requests*

In December 1994, Laura Kenny, the assistant director for health and safety for the Service Employees International Union (SEIU), was asked by Julio Vives, the Union's business agent, to attend a meeting of employees of Respondent who had expressed concerns to him regarding health and safety issues.

At the meeting held on December 20, attended by about 20 employees, the workers raised a number of concerns regarding back injuries, infectious diseases, blood borne pathogens, and issues concerning AIDS, HIV, hepatitis, and tuberculosis. She asked them about whether certain protocols concerning these matters were being followed. The responses indicated that there was "confusion" as to whether the protocols were being followed. In addition, the workers said that they did not receive adequate training as to infectious diseases, and were anxious that they were not being protected adequately.

The following day, Kenny recommended to Union President Frank Russo that she perform a worksite inspection of the facility. A letter was sent that day to Respondent "requesting that you provide access to the union health and safety expert in order to conduct an inspection and investigate hazards."

Having received no response to the letter, on January 10, 1995, another letter was sent to Respondent which requested detailed information including Respondent's programs, policies, and procedures relating to health and safety matters, and training programs concerning those issues, and specifically as to bloodborne diseases, back injuries, chemicals, and tuberculosis.

Thereafter, Union Agent Vives phoned Respondent's administrator, Mitchell Teller. Teller admitting receiving the two letters, but referred Vives to his attorney. Kenny then called Respondent's attorney, who said that Respondent's

main attorney was away, but that he would attempt to learn about the matter and obtain a response.

On February 21, Kenny wrote to Respondent's attorney, David Lew, again requesting an opportunity to make an inspection which she said was necessary "in order for the Union to investigate complaints concerning numerous health and safety hazards at New Surfside, including bloodborne pathogens, TB control and back injuries."

On February 24, Lew wrote to Kenny, asking on what authority she requested to inspect Respondent's premises. He also stated that Respondent did not believe that there were any hazards at the facility, and asserted that the Union's request was a "harassing tactic."

On the same day, Kenny replied, stating that access is required pursuant to Section 8(a)(5) of the Act.

On March 1, the instant charge was filed.

Not having heard from Respondent, Kenny wrote to Lew on May 11, again requesting access in order to conduct an inspection, and the documents previously requested. The letter also stated that the Union had received complaints from Respondent's employees concerning their exposure to health and safety hazards, including those set forth in the previous letters.

On May 18, Lew replied, stating that he was neither aware of any cases of TB, AIDS, or HIV in the past several years, or of complaints of back injuries. He requested copies of "written complaints or data upon which your underlying unfounded request appears to be made." Lew reiterated that he believed that the request was a harassing tactic.

On June 5, Kenny replied that "there exists a potential of exposure to infectious disease for all health care employees" and that regulations mandating specific precautions and procedures for preventing exposure to such diseases must be in place regardless of whether Respondent is treating patients with hepatitis, HIV, or tuberculosis. She further explained that employees told her that certain precautions and procedures are not followed by Respondent, including the availability of personal protective equipment and proper disposal of regulated waste.

The Union was never granted access for the walk through inspection, and it never received the information it requested.

B. *The Reasons for the Requests*

Kenny has been employed for the SEIU for 10 years, during which time she has conducted more than 100-workplace investigations, half of which were in hospitals and nursing homes. Her responsibilities include providing assistance to the SEIU Locals in the areas of occupational safety and health. She develops training and education programs and evaluates health and safety conditions at worksites.

Kenny testified that the documents were requested in order to determine whether training programs were in place. She stated that she could have learned some of the information she sought from employees, such as whether the training had occurred, whether employees were using certain equipment, and whether they were aware of certain safety precautions. However, she observed that the information she could obtain from employees would be incomplete, and possibly inaccurate.

She testified that she wanted to conduct an inspection of Respondent's facility in order to perform an effective risk assessment of the nursing home, and to evaluate its health and safety program. She stated that the only way one can determine whether regulations are being followed is through such an inspection, during which she can observe the kinds of tasks the employees are performing; their work processes; the type and sufficiency of equipment provided; whether the equipment works; whether personal protective equipment is necessary and if it has been provided and is being used; engineering controls; proper isolation rooms for tuberculosis patients; and the risk for back injuries. Kenny noted that nursing homes are the most dangerous industries in the country because back injuries are a major cause of worker compensation claims.

Kenny testified that although she would visit patient care areas, she would simply observe the care being administered at the doorway to a patient's room, and would have no contact with any patient. She stated that she generally inspects the worksite with a representative of management, and does not speak with employees while they are working.

C. *Respondent's Defenses*

Administrator Teller testified that access to the nursing home is limited, and all those visiting the facility must sign in. Those permitted access are the families of the residents, contractors who perform various maintenance jobs at the facility, nursing consultants who review patient care plans, and recreational consultants who evaluate the programming of the recreation department. Solicitations are not permitted on its premises.

Access is required to be given to New York State Department of Health agents who survey Respondent for compliance with state and Federal regulations governing patient care. In addition, at least two programs per month are held at the facility in which entertainers such as singers, musicians, and a magician entertain the residents. Those programs are held in the main floor recreation room.

Since 1988, no grievances have been filed by the Union concerning health and safety issues, and no arbitrations have been held concerning those matters.

Respondent makes several arguments in defense of its refusal to permit access to the Union for the purpose of conducting an inspection. It argues that before permitting such access, the Union must (a) first identify the information it seeks, (b) demonstrate that physical access is necessary to obtain that data, and (c) show why alternative methods for obtaining such data would not be sufficient.

Respondent argues that the letters requesting access did not request specific information or justify the need for comprehensive access, specifically the hazards it sought to investigate, the employees affected, how the inspection would be conducted or the areas to be inspected.

In addition, Respondent contends that the requests for access and information are part of a campaign of harassment designed to put pressure on it to sign a collective-bargaining agreement.

In this connection, the contract between the Union and an employer association of which Respondent was a member of at that time, expired in March 1990. Negotiations between Respondent and the Union on an individual employer basis were not successful, and no new agreement had been executed at the time of the hearing.

In February 1995, the Union distributed a flyer accusing Respondent of earning large profits and paying its officers

"exorbitant" salaries while at the same time refusing to sign a collective-bargaining agreement. Another flyer distributed at that time which also protested the lack of a contract, stated: "[F]inally we must address the problems of health and safety and staffing in all the Rockaway homes in this campaign. Nearly all the federal inspections reflect this especially at New Surfside and Lawrence. We must make leaders of the community aware of what is happening to workers and patients."

III. ANALYSIS AND DISCUSSION

A. *The Request for Information*

An employer has a duty to supply requested information to a union which is the collective-bargaining representative of the employees if the requested information is relevant and reasonably necessary to the union's performance of its responsibilities. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); and *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). The standard for determining the relevance of requested information is a liberal one and it is necessary only to establish "the probability that the desired information is relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities." *NLRB v. Acme Industrial*, supra at 437.

"The health and safety of employees are terms and conditions of employment, and thus mandatory subjects of bargaining about which an employer is obligated to bargain with the collective-bargaining representative of its employees." *American National Can Co.*, 293 NLRB 901, 904 (1989). "Health and safety matters regarding the unit employees' workplaces are of vital interest to the employees and are, thus, generally relevant and necessary for the union to carry out is bargaining obligations. . . . Few matters can be of greater legitimate concern." *Detroit Newspaper Agency*, 317 NLRB 1071 (1995).

The detailed items requested by the Union in its letter of January 10, 1995, related to matters of extreme concern to the employees, specifically relating to Respondent's health and safety policies and procedures, and issues concerning bloodborne diseases, chemicals, back injuries, and tuberculosis.

Respondent first argued that this information was available and would be provided to the Union. However, by the time of the hearing this had not been done and indeed, Kenny testified that no documents had been furnished.

In *Indiana Hospital*, 315 NLRB 647, 664 (1994), the Board upheld the union's request for reports concerning the hospital's industrial safety and hygiene. The Board noted that the matters in the report were "likely to impact on the unit employees' duties and work assignments, which are mandatory subjects of bargaining," and were clearly relevant to and necessary to the union's proper performance of its collective-bargaining responsibilities to the unit employees.

Here, the request for information made by the Union clearly would be of use to it in fulfilling its responsibilities as the employees' representative. Thus, at the December 20 meeting, employees voiced their concern over health and safety issues which existed at Respondent's facility. In order to remedy those conditions, or at least examine whether hazardous conditions existed, the Union was entitled to the information it requested.

Such information would provide details, inter alia, as to whether Respondent has a health and safety program, the details of such program, whether the program is in effect, and records of occupational injuries and illnesses at the facility.

I accordingly find and conclude that Respondent violated the Act by failing and refusing to provide the Union with the documents it requested in its letter of January 10, 1995.

B. *The Request for Access*

In considering a union's request for access to an employer's premises, the Board employs a balancing test. Each of two conflicting rights must be accommodated. First, the right of employees to be responsibly represented by a union, and the right of the employer to control its property and ensure that its operations are not interfered with. *Holyoke Water Power Co.*, 273 NLRB 1369, 1370 (1985). The facts must be carefully weighed in making this determination.

The Board has, in several cases, affirmed the right of a union to have its expert obtain access to an employer's premises in order to inspect actual or "possible" hazardous health and safety conditions.

In *Holyoke*, the Board stated:

> Where it is found that responsible representation of employees can be achieved only by the union's having access to the employer's premises, the employer's property rights must yield to the extent necessary to achieve this end. However, the access ordered must be limited to reasonable periods so that the union can fulfill its representation duties without unwarranted interruption of the employer's operations. On the other hand, where it is found that a union can effectively represent employees through some alternate means other than by entering on the employer's premises, the employer's property rights will predominate, and the union may properly be denied access. [Id.]

Thus, in the following cases, the Board, on balancing the respective interests, concluded that the union's access predominated over the employer's, and permitted entry to the employer's premises by the union for health and safety issues.

In *Holyoke*, supra, access was permitted to the employer's fan room to the union's industrial hygienist to permit that person "to fully observe and survey noise level hazards." It was noted that it was expected that "little if any interference with the production process" would result from such an inspection.

In *C.C.E., Inc.*, 318 NLRB 977, 978 (1995), the Board stated that "the information the union seeks to obtain from direct observation of the plant premises and process is presumptively relevant to and necessary for its role as the employees' collective-bargaining representative." The union agent sought to inspect the premises for "possible health and safety problem areas" which the union thought might cause health concerns due to the substances used in the plant and the type of tools the employees worked with. The union agent sought by the inspection to be able to later address any health and safety issues that arose.

In *Gilberton Coal Co.*, 291 NLRB 344, 347 (1988), the Board upheld the union's request for access in order to investigate employee reports of harmful conditions. The Board

stated that "the only way the Union could determine the current accuracy of the employees' allegations about the unhealthy conditions . . . was to visit them." See also *Hercules, Inc.*, 281 NLRB 961, 969 (1986).

In making the determination as to whether access should be granted, an evaluation must be made as to:

> The availability of alternative means to the union to obtain information other than through an invasion of the property, the nature of the employer's operation, the impact of access on production and discipline, the extent to which nonemployees are permitted to enter on private property, the nature of the information sought as a result of the access request, and the location on the property where the exercise of the protected activity will occur. [*Hercules*, supra, 281 NLRB at 970.]

The importance of onsite inspections has been made quite clear: "There can be no adequate substitute for the union representative's direct observation of the plant equipment and conditions, and employee operations and working conditions, in order to evaluate matters such as . . . safety concerns." *C.C.E., Inc.*, supra. See *Asarco, Inc.*, 276 NLRB 1367, 1370 (1985).

Respondent contends that alternative sources of obtaining the information were available, through the employees.

Respondent argues, and Kenny conceded, that the employees could have provided her with certain information she sought concerning whether the employees were trained in safety techniques; whether certain types of equipment, such as lifting devices were available; and whether they were being used, and how chemicals were handled. Kenny noted, however, that certain of the information she could obtain would be incomplete and not trustworthy. She stated that employees may be likely to tell her what they believed she wanted to hear, for example that they were using lifting devices, when in fact they were not. Further, they may not admit that lifting devices were available if they don't use them. The Union need not rely on employee observations. *Hercules, Inc.*, supra at 970.

Respondent's property rights are entitled to great weight inasmuch as it is a nursing home, caring for elderly, fragile patients. However, Kenny's assertion that during her inspection she would not speak with employees while they were working, and not interfere with patient care, lessens the impact of the tour on the nursing home's operations. It should also be noted that other nonemployee visitors, including entertainment groups, visit regularly at the premises. I have considered that the entertainers are confined to the first floor recreation room, and that Kenny's inspection would cover the entire facility, but I further note that mandatory inspections by governmental bodies are routinely conducted without apparent disruption of the nursing home's operations.

I reject Respondent's argument that the Union was required to support its request for access by a detailed identification of the information it sought, demonstration that access was necessary to obtain that data, and a showing why alternative methods for obtaining such data was not sufficient. First, it is the employer's burden to establish those factors which would support a conclusion that its property right is paramount to the union's right of reasonable access. *Hercules*, supra. Respondent has not done so. Rather, the Union has made a strong showing that access is clearly warranted, and it has, in fact, identified general problem areas it seeks to examine, such as exposure to bloodborne pathogens, tuberculosis control, and back injuries. It has also shown that it is impossible to obtain such information through alternative means.

In its letters refusing access, Respondent asserted that inasmuch as the parties' collective-bargaining agreement had expired, the Union had no right to access. I reject that argument. The Board has held that the access provisions of a collective-bargaining agreement survive the expiration of the contract. *Gilberton Coal Co.*, supra, 291 NLRB at 348.

Respondent also denied access on the ground that the Union's request was not made in good faith, and that it was a harassment tactic. In support of its argument, Respondent produced the two flyers set forth above, which were issued in February 1995, 2 months after the first request. It is clear that the Union's request for information and access derived from the December meeting at which employees expressed their concerns over possibly unhealthy working conditions at Respondent's facility. I, therefore, reject Respondent's argument.

In applying the *Holyoke* balancing test, it is clear that the scale is decidedly in favor of the Union's right to access to Respondent's facility for an inspection by its health and safety representative. The evidence establishes that responsible representation of the employees may be accomplished only by affording the Union's expert access to the facility.

I accordingly find and conclude that by refusing access to its facility, Respondent violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. At all material times, pursuant to Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the employees in certain units set forth in certain collective-bargaining agreements, including service and maintenance employees, licensed practical nurses, and paraprofessional employees.

4. By failing and refusing to provide to the Union the information requested in its letter of January 10, 1995, Respondent unlawfully refused, and is refusing, to bargain in violation of Section 8(a)(5) of the Act.

5. By denying the Union's requests for access to its facility by the Union's health and safety representative in order to inspect the health and safety conditions that were relevant to the Union's discharge of its bargaining obligation, Respondent violated Section 8(a)(5) and (1) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

[Recommended Order omitted from publication.]